

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE COMMISSIONER OF LABOR AND INDUSTRY

In the Matter of the Order to
Comply/Labor Law Violation and
Penalty Assessment for Failure to
Make and Keep Records and Pay
Overtime of Royal Health Care

**RECOMMENDATION AND
ORDER ON MOTION FOR
SUMMARY DISPOSITION**

This matter comes before Administrative Law Judge Kathleen D. Sheehy on the Department's motion for summary disposition, filed on November 10, 2008. Royal Health Care filed no response to the motion by November 26, 2008, the date set for filing any written response. The OAH record on the motion closed on that date.

Jackson Evans, Assistant Attorney General, 445 Minnesota Street, Suite 900, St. Paul, Minnesota 55101-2127, appeared for the Department of Labor and Industry (Department). Royal Health Care (Respondent), 5637 Brooklyn Boulevard #300, Brooklyn Center, MN 55429, made no appearance in response to the motion.

Based upon all of the files, records and proceedings herein, and for the reasons set forth in the accompanying Memorandum,

1. **IT IS RECOMMENDED** that the Commissioner GRANT the Department's motion for Summary Disposition and AFFIRM the Penalty Assessment dated February 3, 2005, and the Order to Comply dated March 7, 2005; and
2. **IT IS ORDERED** that the hearing in this matter currently scheduled for January 16, 2009, shall be **CANCELLED**.

Dated: December 11, 2008

s/Kathleen D. Sheehy

KATHLEEN D. SHEEHY
Administrative Law Judge

NOTICE

This Report is a recommendation, not a final decision. The Commissioner of the Minnesota Department of Labor and Industry will make the final decision after reviewing the record. The Commissioner may adopt, reject or modify this Recommendation and Order on Motion for Summary Disposition. Under Minn. Stat. § 14.61 (2008), the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days.¹ An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact the office of M. Scott Brener, Commissioner, Minnesota Department of Labor and Industry, 443 Lafayette Road North, St. Paul, MN 55155, (651) 284-5065 to find out how to file objections or present argument.

If the Commissioner fails to issue a final decision within 90 days of the close of the record, this Report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. The record closes upon the filing of exceptions to the Report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes. Under Minn. Stat. § 14.63, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

MEMORANDUM

The Department enforces the Fair Labor Standards Act (FLSA) in Minnesota pursuant to chapter 177 of Minnesota Statutes. Based upon the receipt of a complaint, the Department conducted an audit of Royal Health Care. On February 3, 2005, the Department issued a Notice of Labor Law Violation and Penalty Assessment in the amount of \$500, alleging the Respondent had failed to pay ten employees time and a half for all hours worked over 48 in a week and had failed to make and keep employee payroll records in compliance with Minn. Stat. §§ 177.25 and 177.30.² On March 7, 2005, the Department issued an Order to Comply/Labor Law Violation, which advised Royal Health Care of its right to request a hearing pursuant to Minn. Stat. § 177.27, subd. 4.³

On March 14, 2005, the Respondent timely filed an objection, contending that “the hours applied on the timecards, by the employees, may not have all been worked by one individual.”⁴ The Respondent identified four individuals—M.D., C.K., J.M., and G.R.—who it maintained were not owed the amount computed.⁵ The Respondent maintained that these individuals were terminated because they were not always

¹ All citations are to the 2008 edition of Minnesota Statutes.

² Affidavit of Roslyn Wade, Ex. D. The Department calculated unpaid overtime amounts for these employees ranging from \$48 to \$9,394.

³ *Id.*, Ex. E.

⁴ *Id.*, Ex. F.

⁵ *Id.*, Ex. H.

present during the hours they reported working. The Respondent did not dispute the overtime pay calculated for the other six employees.

After issuance of the Notice and Order for Hearing, the parties attempted to mediate this dispute. They were not successful. During discovery, the Department attempted to determine, again without success, the specifics of Respondent's claim that these four individuals were not owed the amount computed. The Department served discovery requests on the Respondent, seeking factual information regarding the number of hours the Respondent believed these four employees did actually work. The Respondent did not respond in any fashion to the requested discovery. The Department then brought a motion to compel discovery, which the Respondent did not oppose. On September 30, 2008, the Administrative Law Judge granted the Department's motion to compel discovery and ordered the Respondent to respond to the interrogatories, requests for production of documents, and requests for admission within five business days of receipt of the Order. The Administrative Law Judge also amended the procedural schedule, setting a deadline of November 26, 2008, for the Respondent to submit a response to the Department's motion for summary disposition.⁶ The Respondent did not respond to the discovery requests as ordered,⁷ and it has submitted no response to the Department's motion for summary disposition.

Procedural Standard

Summary disposition is the administrative equivalent of summary judgment.⁸ Summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.⁹ A genuine issue is one that is not a sham or frivolous. A material fact is a fact whose resolution will affect the result or outcome of the case.¹⁰ The moving party must demonstrate that no genuine issues of material fact exist.¹¹ If the moving party is successful, the nonmoving party then has the burden of proof to show specific facts are in dispute that can affect the outcome of the case.¹² The existence of a genuine issue of material fact must be established by substantial evidence; general averments are not enough to meet the nonmoving party's burden.¹³ The evidence presented to defeat a summary judgment motion, however, need not be in a form that would be admissible at trial.¹⁴ The

⁶ Order on Discovery Motion (Sept. 30, 2008).

⁷ Affidavit of Jackson Evans.

⁸ Minn. R. 1400.5500 (K) (2007).

⁹ *Sauter v. Sauter*, 70 N.W.2d 351, 353 (Minn. 1955); *Louwagie v. Witco Chemical Corp.*, 378 N.W.2d 63, 66 (Minn. App. 1985); Minn. R. Civ. P. 56.03; Minn. R. 1400.5500 (K).

¹⁰ *Illinois Farmers Insurance Co. v. Tapemark Co.*, 273 N.W.2d 630, 634 (Minn. 1978); *Highland Chateau v. Minnesota Department of Public Welfare*, 356 N.W. 2d 804, 808 (Minn. App. 1984).

¹¹ *Theile v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988).

¹² *Highland Chateau*, 356 N.W.2d at 808; *Hunt v. IBM Mid America Employees*, 384 N.W.2d 853, 855 (Minn. 1986).

¹³ *Id.*; *Murphy v. Country House, Inc.*, 307 Minn. 344, 351-52, 240 N.W.2d 507, 512 (1976); *Carlisle v. City of Minneapolis*, 437 N.W.2d 712, 715 (Minn. App. 1988).

¹⁴ *Carlisle*, 437 N.W.2d at 715 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986)).

nonmoving party also has the benefit of the most favorable view of the evidence. All doubts and inferences must be resolved against the moving party.¹⁵

Analysis

The Department argues it is entitled to summary disposition on the two claimed violations by the Respondent. The Department's first claim is that the Respondent violated Minn. Stat. § 177.25 (2008), which requires that an employer pay employees time and a half for all hours worked in excess of 48 hours in a week. The Department has presented evidence showing that, based on the hours reported on the employee timecards, the Respondent failed to pay overtime wages to ten employees.¹⁶ Although the Respondent has argued that four of these employees claimed pay for hours they did not actually work, the Respondent has failed to produce any evidence to support this argument. Moreover, the Respondent failed to respond to Requests for Admission and has failed to offer any reason for its failure to respond. Pursuant to Minn. R. 1400.6800, the Respondent is deemed to have admitted that it owes these employees the unpaid wages calculated by the Department, that it has failed to pay those wages, and that, prior to the Department's investigation, it paid employees the base rate of pay for all hours reported on their timecards.¹⁷ The Administrative Law Judge concludes that the Department has demonstrated that there is no genuine issue of material fact as to the calculation of overtime wages due any of the ten employees. The Department is entitled to judgment as a matter of law that the Respondent violated Minn. Stat. § 177.25 and owes the employees the amounts calculated by the Department.

The Department's second claim is that Respondent violated Minn. Stat. § 177.30(a)(3), which requires employers to make and keep records of the hours worked each day and each work week by employees. "Hours worked each day" is defined to include beginning and ending time each work day, including a.m. and p.m. designations.¹⁸ The Commissioner may fine an employer up to \$1,000 for each failure to maintain records, after considering the appropriateness of the penalty as compared to the size of the business and the gravity of the violation.¹⁹

The Department has presented evidence that during its audit, the Department discovered numerous instances in which the Respondent's time records were incomplete, forcing the Department to review all available check stubs, pay stubs, and time sheets to calculate the number of hours for which employees were paid.²⁰ Based on the statutory factors, the Department assessed against the Respondent a total fine of \$500 for failure to keep these records. The Respondent has not challenged this

¹⁵ See *Celotex*, 477 U.S. at 325; *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988); *Greaton v. Enich*, 185 N.W.2d 876, 878 (Minn. 1971); *Dollander v. Rochester State Hospital*, 362 N.W.2d 386, 389 (Minn. App. 1985).

¹⁶ Wade Aff., Ex. D (Master Sheet showing gross back wages due the ten employees); see also Exs. I-L (computation worksheets for the four employees whose back wages the Respondent disputed).

¹⁷ Affidavit of Jackson Evans, Sept. 10, 2008, Ex. B (Department's Requests for Admission dated June 19, 2008), submitted in support of Department's Motion to Compel Discovery.

¹⁸ Minn. R. 5200.0100 (2007).

¹⁹ Minn. Stat. § 177.30(b).

²⁰ Wade Aff. ¶¶ 7-8.

evidence in any way. The Administrative Law Judge concludes that the Department has demonstrated that there is no genuine issue of material fact and that the Department is entitled to judgment as a matter of law that the Respondent failed to keep required records and that the assessed penalty is appropriate.

K.D.S.